Rule 11, Ariz. R. Crim. P.
Rule 15, Ariz. R. Crim. P.

STATE'S RESPONSE TO DEFENDANT'S DEMAND FOR DISCLOSURE AND STATE'S REQUEST FOR COURT ORDER AND MOTION FOR SANCTIONS

> **When a defendant has noticed an insanity defense, the defendant must turn over to the State complete copies of all reports from the defendant's retained psychiatric experts, whether or not the defense intends to call a particular expert. The defense cannot independently decide to redact those reports before turning them over to the State.**

The State of Arizona, in response to the defendant's "Motion for State to Disclose Rebuttal Witnesses on or before [date]," respectfully requests this Court to deny the defendant's motion, because the defendant has clearly failed to comply with Rule 15, Arizona Rules of Criminal Procedure. The State further moves this Court to order sanctions and require defense counsel to promptly provide complete disclosure as required by law. The attached Memorandum of Points and Authorities supports the State's request.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS.

The defendant is charged with [list offenses]. The defendant demands that the State immediately supply him with a list of the State's rebuttal witnesses and with copies of all of their reports, yet the defendant himself has failed to comply with the rules of discovery and has effectively precluded the State from commencing an appropriate and comprehensive responsive mental health investigation.

The defendant informally noticed the affirmative defense of insanity pursuant to A.R.S. § 13-502(B) during a hearing before this Court on [date]. On that date, and as requested pursuant to A.R.S. § 13-502, this Court appointed Dr. Potts to evaluate the

defendant. Dr. Potts found that the defendant was sane when he committed the offenses with which he is now charged. When the defense had received and reviewed Dr. Potts' report, the defendant notified this Court and counsel for the State that the defense would be retaining another expert to review Dr. Potts' report and evaluate the defendant. The second expert also concluded that the defendant was sane when he committed the charged offenses. After receiving and reviewing that expert's report, the defendant withdrew the notice of insanity defense.

Subsequently, the defendant retained additional experts, Dr. [Name One] and Dr. [Name Two]. Those experts then prepared reports documenting their opinions about the defendant's sanity at the time when he committed the offenses. On [date], the defendant again noticed the defense of insanity and provided partial discovery to the State. The discovery provided included the following items:

[List material received.]

Before turning these materials over to the State, the defense made substantial redactions from the majority of the documents disclosed. The State is not aware of any order from this Court that authorized the defense to make such redactions. The discovery as provided is clearly inadequate, incomplete, and improperly redacted. As a result, the defense has effectively stalled the State's ability to conduct a thorough responsive investigation. Furthermore, Dr. Potts advised this deputy on [date] that the defendant's counsel had instructed him not to speak to the State's counsel about his examination and evaluation of the defendant, specifically concerning any statements that the defendant made to the doctor. Dr. Potts is not the defendant's expert; he is this

Court's expert. Defense counsel has no authority to dictate such gag orders to this Court's expert.

II. LAW AND ARGUMENT

A. The defendant has failed to meet his discovery obligations because he improperly redacted substantial amounts of mental health disclosure that Rules 11.4 and 15 required him to disclose.

Rule 11.3, Ariz. R. Crim. P., provides for court appointment of mental health experts. Rule 11.4(a) states that reports of such court-appointed experts *shall* be made available to all parties, "except that any statement or summary of the defendant's statements concerning the offense charged shall be made available only to the defendant." Rule 11.4(b), captioned "Reports of Other Experts," addresses the reports of all experts other than court-appointed experts. That subsection provides:

> [T]he parties *shall* make available to the opposite party for examination and reproduction the names and addresses of mental health experts who have personally examined a defendant or any evidence in the particular case, together with *the results of mental examinations* of scientific tests, experiments or comparisons, *including all written reports or statements* made by them in connection with the particular case.

[Emphasis added.]

Rule 11.7(a), Ariz. R. Crim. P., then restricts the use of evidence "obtained under these provisions … ***unless*** *the defendant presents evidence intended to rebut the presumption of sanity.*" [Emphasis added.] Rule 11.7(b)(1) provides:

> No statement of the defendant obtained under these provisions, or evidence resulting therefrom, concerning the events which form the basis of the charges against the defendant shall be admissible at the trial of guilt or innocence, or at any subsequent proceeding to determine guilt or innocence, *without his or her consent*.

[Emphasis added.]

In this case, the defendant has already presented some evidence intended to rebut the presumption of sanity, and has indicated that he will present more evidence at trial. The defendant's retained experts have also been provided with the reports of the defendant's court-ordered examination, and the defendant's retained experts relied upon those reports in reaching the conclusions upon which the defendant now bases his defense. Thus, the defendant has effectively consented to the use of his statements contained within the reports of his retained experts.

Rule 11, Ariz. R. Crim. P., does not provide any mechanism for redacting any part of an expert's report. However, Rule 15.2(c)(2), Ariz. R. Crim. P., requires a defendant to make available to the prosecutor the "names and addresses of experts whom the defendant will call at trial, together with the results of the defendant's physical examinations and of scientific tests, experiments or comparisons, including *all written reports and statements*, made by them in connection with the particular case." [Emphasis added.] Rule 15.5 then sets forth the procedures for redacting documents before disclosure. On motion of any party, Rule 15.5(b) permits the trial court to authorize excision of nondiscoverable material, and subsection (c) permits the court to perform an *in camera* inspection of materials before any disclosure is made.

> **b. Discretion of the Court to Authorize Excision.** Whenever the court finds, on motion of any party, that only a portion of a document or other material is discoverable under these rules, it may authorize the party disclosing it to excise that portion of the material which is nondiscoverable and disclose the remainder.
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> **c. Protective and Excision Order Proceedings.** On motion of the party seeking a protective or excision order, or submitting for the court's determination the discoverability of any material or information, the court may permit the party to present the material or information for the inspection of the judge alone. Counsel for all

> other parties shall be entitled to be present when such presentation is made.
>
> **d. Preservation of the record.** If the court enters an order that any material, or any portion thereof is not discoverable under this rule, the entire text of the material shall be sealed and preserved in the record to be made available to the appellate court in the event of an appeal.

Rule 15.5(b-d), Ariz. R. Crim. P.

Rule 15.5, Ariz. R. Crim. P., thus deals comprehensively with redaction issues. Nevertheless, the defense did not follow any of the procedures provided in Rule 15.5 here. Instead, without lawful basis or authority from the Court, the defense took it upon itself to redact significant information – including information on which the defendant's own experts relied – from the experts' reports provided to the State. Without that information, the State cannot effectively conduct an adequate rebuttal investigation. No legal basis exists for the defense to have performed such redactions, and certainly there is no legal basis for the defense's attempting to redact such information without even notifying this Court. Accordingly, the State asks this Court to order the defense to provide the State with the complete discovery to which the State is entitled under the Rules of Criminal Procedure.

B. The Arizona Court of Appeals has also held that a defendant who is raising an insanity defense must turn over to the State the reports of both testifying and non-testifying mental health experts.

In *Austin v. Alfred*, 163 Ariz. 397, 788 P.2d 130 (App. 1990), the Arizona Court of Appeals held that a defendant raising an insanity defense was required to disclose the names and reports of his non-testifying mental health experts as well as his testifying experts. The Court construed A.R.S. § 13-3993 and Rule 11.4 as requiring disclosure of information regardless of whether the experts would be called as witnesses. However,

the Court failed to recognize the distinction between Rules 11.4(a) and (b), so the Court then permitted excision of the defendant's statements concerning the offense from the *retained* experts' reports:

> Rule 11.4(a) expressly exempts from disclosure a defendant's statements made to a court-appointed mental health expert. In the matter before us, the reports were prepared by experts retained by the defense rather than court-appointed defense experts. Subsection (b), which encompasses retained experts, contains no similar exemption for such reports. However, we see no reason why subsection (b) should not provide the same safeguard against disclosure as subsection (a). No basis exists for disparate treatment of statements made to a court-appointed expert and those made to an expert retained by the defendant. Moreover, since the statements may not be used at trial, Rule 11.7, Ariz. R. Crim. P., 17 A.R.S., there is no justification for requiring that they be disclosed.

Id. at 400, 788 P.2d at 133. The Court concluded that the trial judge's order in that case "must be modified to prohibit disclosure of any statement or summary of Austin's statements concerning the offenses. The reports should be submitted to the trial court for *in camera* review so that the trial court can excise Austin's statements concerning the offenses." *Id*.

Despite the holding of *Austin v. Alfred*, *supra*, the State submits that there is a logical, rational basis for treating statements of appointed and retained experts differently. Rule 11.4(a) specifically refers to reports of court-appointed experts, because it would be unfair to order an examination of a defendant and then use his statements against him *if* he does not put his sanity at issue. This is essentially the holding in *Estelle v. Smith*, 451 U.S. 454, 465 (1981). However, Rule 11.4(b) addresses an entirely different situation. When *either* side voluntarily retains its own experts, the opposing party is entitled to the reports. Clearly, if the State were to retain private experts to examine the defendant, the State would have to produce complete reports of

such experts' reports to the defendant. Accordingly, the defendant should not be permitted to pick and choose what to disclose from his experts' reports. Sanity is now at issue in this case, and the defendant's experts – the same experts upon whom he now bases his defense – have already relied upon the defendant's statements, including those statements made to this Court's expert.

The Court in *Austin* acknowledged that a defendant's statements to his *non*-testifying experts were not protected by either the work product doctrine or the attorney-client privilege. *Austin v. Alfred*, 163 Ariz. 397, 400-02, 788 P.2d 130, 133-35 (App. 1990). Further, the *Austin* Court referenced the "balancing test" used in *United States ex rel. Edney v. Smith*, 425 F.Supp. 1038 (E.D.N.Y. 1976), as "useful in considering the opposing interests presented here." *Austin*, 163 Ariz. at 401, 788 P.2d at 134. The federal *Edney* case found no constitutional violation when the State called a psychiatrist retained by the defendant's former counsel after the defendant raised an insanity defense. The Court in *Austin* stated that the federal court in *Edney* balanced the use of information and the possible prejudice to the defendant against the State's counterbalancing interest in accurate fact-finding:

> The court rejected the notion that the defendant should be allowed to produce psychiatric evidence showing he was not responsible for his criminal acts because of a mental disease or defect while simultaneously precluding the prosecution from offering an expert witness, whose opinion was unfavorable to the defendant, simply because the expert had been retained by defendant's counsel. 425 F.Supp. at 1052.

Austin, *id*. However, neither the federal court nor the New York appellate court addressed any necessity to further balance the interests by excluding the defendant's statements. In fact, the New York state court in the same case concluded that "a plea of innocence by reason of insanity constitutes a complete and effective waiver by the

defendant of any claim of privilege." *People v. Edney*, 39 N.Y.2d 620, 625, 350 N.E.2d 400, 403 (1976). The *Austin* court stated that it agreed with the court's reasoning in the federal *Edney* case that privileges could be waived, "particularly in light of our protection of Austin's statements regarding the offenses." 163 Ariz. at 402, 788 P.2d at 135. Nevertheless, the court in the federal *Edney* case did not qualify its opinion by stating that the defendant needed this additional "protection."

In *State v. Thornton*, 187 Ariz. 325, 929 P.2d 676 (1996), the Arizona Supreme Court indicated that redaction of defendants' medical records is not necessarily required. The defendant in *Thornton* conceded that by raising the insanity defense, he waived physician-patient privilege as to his mental health records (A.R.S. §13-3993(C)). The defendant also agreed that the State could use relevant evidence about his mental health that it gained through its own investigation, and that the State could have required him to submit to a mental health evaluation. However, the defendant argued that the trial court's order requiring him to disclose all mental health experts and hospital records of past evaluations violated his Fifth Amendment rights. The Arizona Supreme Court rejected that argument, stating:

> [T]he act Thornton was required to perform did not reveal his subjective knowledge or his thought process and thus did not implicate the Fifth Amendment. Compelling Thornton to disclose the identity of past psychiatrists was a neutral act that by itself was not inculpatory …. Although providing this information may have led to an inquiry that resulted in the discovery of inculpatory information, "those developments depend on different factors and independent evidence." … Similarly, requiring Thornton to turn over his past records was not testimonial or communicative, nor did the act of providing the records incriminate him in any way. The state could have obtained the records from the psychiatrists *with or without excision*. The records were discoverable because he put insanity at issue. There is thus no self-incrimination issue.

Id. at 331, 929 P.2d at 682 [citation omitted, emphasis added].

The rules and purposes of discovery also favor a reciprocal right of discovery. In *State v. Druke*, 143 Ariz. 314, 693 P.2d 969 (App. 1984), the defendant argued that the State was not entitled to appointment of an expert under Rule 11 and A.R.S. § 13-3993, because he was not raising an insanity defense but only intended to present testimony on his mental condition to negate the element of intent. The Court of Appeals refused to read the rule that narrowly, stating that doing so would "create a situation in which the State is denied reciprocal rights of discovery. Such a construction would be totally contrary to the spirit and purpose of the rules, and would give an unfair and unwarranted advantage to [the defendant] in the presentation of his defense." *Id.* at 318, 693 P.2d at 973.

Likewise, the Court of Appeals in *Austin* noted that the *Edney* court found it unjust and inequitable for a defendant to suppress unfavorable psychiatric evidence while shopping for a friendly expert:

> Certainly defendant would have called [the psychiatrist] had his opinion been favorable to defendant's position. Just as clearly, under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), had the government retained [the psychiatrist] initially and had he found defendant to be insane, the prosecutor would have been under a legal obligation to disclose this information to his adversary.

163 Ariz. at 402, 788 P.2d at 135, citing *Smith*, 425 F.Supp. at 1052.

The State is entitled to complete copies of each expert's reports, including all of the defendant's statements, whether those statements are contained in the experts' reports, files, or notes. The State further requests this Court order complete and unredacted disclosure of all sources upon which the defendant's experts base their reports.

C. The State is entitled to *complete* mental health discovery, including the defendant's statements, complete experts' reports, notes, and the sources of information upon which the experts relied in reaching their conclusions. Neither the attorney-client privilege nor the doctor-patient privilege applies.

The Arizona statutes clearly require a defendant who is raising a mental disability defense to provide the State with *complete* copies of the doctors' reports. First, A.R.S. § 13-3993(C) expressly provides that there is no doctor-patient privilege as to the defendant's mental state when the defendant raises any mental disability defense:

> C. The privilege of confidential communications between a medical doctor or licensed psychologist and the defendant as it relates to the defendant's mental state at the time of the alleged crime does not apply if any mental disability defense is raised.

A.R.S. § 13-3993(D) then mandates that, before trial, both sides will receive *complete* copies of any examining expert's report on the defendant's mental state:

> D. If any mental disability defense is raised, both the state and the defendant *shall* receive prior to the trial *complete* copies of any report by a medical doctor or licensed psychologist who examines the defendant to determine the defendant's mental state at the time of the alleged crime or the defendant's competency.

[Emphasis added.]

By noticing an insanity defense and voluntarily retaining experts to examine him and present evidence intended to rebut the presumption of sanity, the defendant waived any privilege as to statements made to his testifying experts. A.R.S. § 13-3993(C); Rule 11.7(a), Ariz. R. Crim. P. The State is therefore entitled to use the experts' reports and cross-examine each testifying expert witness about statements from all sources upon which the expert relied.

The defendant has also waived any privilege as to his retained mental health experts whom he does *not* intend to call to testify. Preventing the State from obtaining

complete reports of these witnesses would allow the defendant to hide unfavorable information while presenting only the opinions of his friendly witnesses that are favorable to his cause. This clearly violates the reciprocal rules of discovery applicable to every defendant. Any provisions permitting exclusion of the defendant's statements obtained during a *court-ordered* examination should not apply when the defendant *retains* experts to support his insanity defense – especially when those retained experts rely on the appointed expert's reports containing the defendant's statements made during the court-ordered examination.

As one federal court concisely stated the issue:

> [D]efendant suggests that he be permitted to suppress any unfavorable psychiatric witness whom he had retained in the first instance, under the guise of attorney-client privilege, while he endeavors to shop around for a "friendly" expert, and takes unfriendly experts off the market.

United States ex rel. Edney v. Smith, 425 F.Supp. 1038, 1053 (E.D. N.Y. 1976). The court in *Edney* held that the State was entitled to receive all of the defendant's statements to his retained experts. That court reasoned that, if the first doctor's opinion had been favorable to the defendant, the defendant would certainly have called that doctor to testify. Further, if the State had retained that doctor and that doctor had found the defendant to be insane, the State would have had to turn that information over to the defense as exculpatory *Brady* material. *Brady v. Maryland*, 373 U.S. 83 (1963). The *Edney* court thus reasoned that constitutional law did not prohibit the State from "obtain[ing] complete insight into the defendant's claim of insanity merely because one of the expert witnesses who had examined him had done so at the request of one of defendant's former attorneys." *Edney*, *id*. The *Edney* court noted that the defendant's statements to his psychiatrist "were not admitted to establish the fact of his having

committed the murder, but only to establish a basis for the psychiatrist's evaluation of petitioner's sanity at the time of the offense." The *Edney* court concluded that, given this limited use, "any possible prejudice may be balanced, within limits not exceeded in his case, by the strong counterbalancing interest of the State in accurate fact-finding by its courts." *Edney*, *id*. at 1054. *Edney* therefore held that by offering his own testimony on the insanity issue, the defendant waived any claim that disclosure of any part of such communications violated his attorney-client privilege.

Arizona appellate courts have ruled similarly. In *State v. Turrentine*, 152 Ariz. 61, 730 P.2d 238 (App. 1986), the Court of Appeals addressed whether physician-patient privilege applied to statements the defendant made to doctors (both treating and non-treating) that he called to testify on his behalf. The Court concluded that the privilege did not apply:

> [The privilege] cannot be used both as a sword and a shield at the same time. The defendant cannot cast aside the protection of the privilege for matters that benefit him and then invoke the privilege to prevent the prosecution from inquiring into matters that may be harmful to him. … When appellant opened the door to the issue of his sanity, he necessarily opened the door to statements he made to the physicians.

Id. at 66, 730 P.2d at 243 [citations omitted].

In *State v. Tallabas*, 155 Ariz. 321, 746 P.2d 491 (App. 1987), the Court of Appeals extended the reasoning of *Turrentine* to situations in which the defendant calls the court-appointed expert to support the defendant's insanity defense. In addition to waiving the physician-patient privilege, the defendant also relinquishes some Fifth Amendment rights. The Court stated that Rule 11.7(b)(1) – which is grounded in the Fifth Amendment – "codifies the holding that it is fundamentally unfair for a court-appointed psychiatrist after compulsory examination to transmit a defendant's

incriminating statements to the jury." *Id.* at 323, 746 P.2d at 493. However, the defendant in that case chose to call the doctor to prove insanity:

> And in so choosing, we hold, he consented to a thorough cross-examination of the doctor by the state, a cross-examination that probed and tested the bases of the doctor's opinion of insanity and exposed any statements by defendant to the doctor insofar as they underlay or related to that opinion.

Id. The Court held that in such situations, consent under Rule 11.7(b)(1) will be implied:

> [W]hen defendant calls the Rule 11 examiner as a witness to assert the insanity defense, the courts will imply consent to a thorough cross-examination of the examiner, including disclosure of defendant's statements at the time of the examination, to the extent that such statements relate to the issue of insanity or underlie the witness's opinion on that issue. Rule 705, Arizona Rules of Evidence.

Id. at 325, 746 P.2d at 495. The Court distinguished situations in which the State is precluded from introducing a defendant's statements because the *State* calls the witness to establish *sanity*, from those in which the *defendant* calls the witness to establish *insanity* and thus exposes that witness to cross-examination.

In this case, the defendant has not chosen to call experts whose reports were unfavorable to his chosen defense. However, he has provided those experts' reports to the retained defense experts whom he intends to call at trial. In turn, the retained defense experts reasonably relied on those reports and other resources in drawing the conclusions and opinions they have reached in this case. The State and its experts are therefore clearly entitled to review and consider those same sources.

The Rules of Evidence allow inquiry about documents and statements that underlie the expert's opinion. *See* Rules 703 and 705, Ariz. R. Evid. "Once an expert offers his opinion, it is proper to inquire into the reasons for his opinion, including the facts upon which it is based, and to subject the expert to a most rigid cross-examination

concerning his opinion and its sources." *State v. Stabler*, 162 Ariz. 370, 374, 783 P.2d 816, 820 (App. 1989).

The Court of Appeals in *Tallabas*, *supra*, noted that when a defendant asserts an insanity defense, he may be required to submit to an examination by the State's experts, such as provided in § 13-3993. The Court cited dicta from *Estelle v. Smith*, 451 U.S. 454, 465 (1981), which held that a defendant's statements in a compulsory examination cannot be used against him when he does not raise a psychiatric defense, and stated:

> When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist.

Tallabas, 155 Ariz. at 324, 746 P.2d at 494.

The United States Supreme Court subsequently stated in *Buchanan v. Kentucky*, 483 U.S. 402, 422-423 (1987), that its reasoning in *Estelle* leads to the proposition that if a defendant requests a psychiatric evaluation or presents psychiatric evidence, at the very least, "the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of psychiatric testimony by the prosecution."

Courts in other jurisdictions have also held that when a defendant puts his sanity at issue and retains an expert, the defendant's statements are discoverable and can be used against him. In *State v. Vilvarajah*, 735 S.W.2d 837, 840 (Tenn. App. 1987), the court held that Tennessee's procedural rules only excluded statements made by a

defendant during a court-ordered mental examination, and therefore did not prevent the state from obtaining the defendant's statements through his own expert:

> This rule comports with the decision of the United States Supreme Court in *Estelle*. … Thus, the State of Tennessee is free to call Dr. Linder as its witness; and any statements made by the appellant to Dr. Linder will be admissible in the State's case in chief. The psychiatrist-patient privilege does not apply when the patient raises an issue concerning his mental or emotional condition.

In *State v. Davis*, 349 N.C. 1, 42, 506 S.E.2d 455, 477 (1998), the court stated that *Buchanan* rather than *Estelle* applied when a defendant introduced hospital reports through his expert, and the State on cross-examination then elicited defendant's statements from the records. In *State v. Fears*, 86 Ohio St.3d 329, 343, 715 N.E.2d 136, 150 (1999), the court concluded that *Estelle* did not apply when the defendant requested the doctor's appointment, and the doctor testified on cross-examination what the defendant told him about the offense.

In *State v. Pawlyk*, 115 Wash.2d 457, 465, 800 P.2d 338, 342 (1990), the court also distinguished between the situations in *Estelle* and *Buchanan*, and held that regardless of whether defendant intended to call his psychiatrist, the State could obtain the doctor's reports and testimony when the defendant was relying on an insanity defense.

In *Commonwealth v. Contos*, 435 Mass. 19, 26, 754 N.E.2d 647, 654 (2001), the court found that the defendant's use of an expert whom he did not call on to express an opinion did not prevent the State from eliciting an opinion from that expert or from having its own expert rely on the defendant's expert for the defendant's statements.

In *Sanborn v. Commonwealth*, 892 S.W.2d 542, 553 (Ky. 1994), the court concluded:

> [W]here a defendant introduces psychiatric evidence into the record, as Sanborn did, he must also submit to examination by the prosecution's expert for rebuttal purposes. In these instances the scope and admissibility of the expert's findings are not as limited as they were in *Estelle*. If the statements are necessary for the expert to formulate and explain her opinion, then the statements are admissible and are not violative of the defendant's rights.

Accordingly, the State asks this Court to order the defendant to turn over full and unredacted copies of all of his experts' results.

D. The defendant's disclosure is also incomplete based on Dr. [Name]'s provisional report.

One of the items provided by the defendant on [date] included a report from Dr. [Name]. Within that report, Dr. [Name] advises that his opinion is preliminary and provisional because he has not reviewed additional testing and examination materials or the defendant's complete medical history. Accordingly, Dr. [Name]'s opinions are preliminary and await his ability to complete his review of the noted additional testing and materials. Clearly, Dr. [Name] has additional work to be done and his analysis has yet to be completed or finalized. Certainly, the defendant does not intend to present an incomplete mental health evaluation as established by his own expert.

III. SANCTIONS SHOULD BE IMPOSED FOR THE CLEAR VIOLATION OF THE RULES OF DISCLOSURE. THIS COURT SHOULD ORDER DEFENSE COUNSEL TO PROMPTLY PROVIDE THE DISCOVERY IN ITS ENTIRETY.

Rule 15.7, Ariz. R. Crim. P., sets forth provisions for court-imposed sanctions for discovery violations. Generally, "the court may impose any sanction it finds just under the circumstances." Rule 15.7(a), Ariz. R. Crim. P. "The decision whether to impose sanctions and the choice of sanctions for a violation of disclosure is within the sound discretion of the trial court." *State v. Dumaine,* 162 Ariz. 392, 406, 783 P.2d 1184, 1198 (1989). Further, the propriety of a given sanction for a discovery violation is also within

the trial court's sound discretion. *State v. Jackson,* 186 Ariz. 20, 24, 918 P.2d 1038, 1042 (1996); *State v. Krone,* 182 Ariz. 319, 322, 897 P.2d 621, 624 (1995); *State v. Smith,* 123 Ariz. 231, 239, 599 P.2d 187, 195 (1979).

While sanctions are largely within the trial court's discretion, there are certain guidelines and aims. Discovery sanctions should be proportionate to the harm caused, and cure it to the maximum extent that is practicable. *Krone,* 182 Ariz. at 322, 897 P.2d at 624. Furthermore, an appropriate sanction "should have a minimal effect on the evidence and merits of the case." *State v. Towery,* 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996).

The sanctions available to the Court under Rule 15.7, Ariz. R. Crim. P., include, but are not limited to, the following:

1. Ordering disclosure of the information not previously disclosed.

2. Granting a continuance.

3. Holding a witness, party, or counsel in contempt.

4. Precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; and

5. Declaring a mistrial when necessary to prevent a miscarriage of justice.

Rule 15.7(a), Ariz. R. Crim. P.

The State respectfully requests this Court order the defense to disclose the complete and unredacted mental health experts' reports and all of the sources upon which those reports relied. The resulting delay from the defendant's failure to comply with the rules may require the current trial date to be continued. The State cannot fairly evaluate the appropriateness of the current trial date without complete discovery, an opportunity to review the discovery, an opportunity for retained experts to review

discovery and an estimate of time needed by the State's expert to complete their evaluations. Clearly, this is a case that has been delayed time and time again on the defendant's behalf. The State and its experts must be provided a fair opportunity to fully evaluate complete defense mental health disclosure and conduct appropriate follow-up investigation and evaluations.

IV. THE STATE CANNOT EFFECTIVELY COMMENCE REBUTTAL INVESTIGATION WITHOUT COMPLETE DISCLOSURE FROM THE DEFENDANT.

As set forth above, the defendant has effectively stalled the State's ability to move forward with a comprehensive rebuttal investigation. The State has been precluded from fairly and completely reviewing the documents, records, and reports submitted by the defendant. The State has been precluded from effectively consulting with potential State's experts, because the State cannot effectively evaluate the defendant's experts' conclusions without being able to review the sources upon which those experts based their conclusions. It is clearly in the interests of all parties for the State to be provided complete discovery and conduct a fair and comprehensive investigation regarding the mental health issues presented in this case.

V. CONCLUSION

By noticing an insanity defense and voluntarily retaining experts to examine him, a defendant waives any privilege as to statements made to his testifying experts. The State is entitled to use the experts' reports and cross-examine these witnesses regarding the defendant's statements from all sources relied upon by the experts. The defendant's statements are not privileged now that his mental health is at issue. The statements that the defendant voluntarily provided to his experts are not privileged when those experts relied on those statements in reaching their conclusions.

Any privilege is waived as to the defendant's non-testifying mental health experts' reports. Preventing the State from obtaining complete reports of these witnesses would allow the defendant to hide unfavorable information while presenting only the opinions of his friendly witnesses. This would clearly place the State and the defendant in unequal positions, because the State is required to disclose information favorable to the defendant. Further, such refusal to disclose the defendant's own statements, relied upon by his experts, is clearly against the interests of justice and accurate fact-finding. Rules requiring exclusion of the defendant's statements obtained during court-ordered examinations are not applicable when the defendant retains experts to support his insanity defense.

Finally, even if the defendant believed that certain statements *might* be subject to excision, the defendant himself cannot, through counsel, decide which statements he chooses to withhold. As stated by the Court of Appeals in *Austin,* the defendant's reports "should be submitted to the trial court for *in camera* review so that the trial court can excise [defendant's] statements concerning the offenses." 163 Ariz. at 400, 788 P.2d at 133. Rules 15.5(b) and (c) require the court to determine which portions of documents are nondiscoverable, and the defendant should have submitted his documents to this Court so that this Court could determine what material, if any, had to be redacted, rather than simply providing redacted copies to the State.

Because the defendant has clearly failed to comply with Rule 15, Ariz. R. Crim. P., the State respectfully requests this Court to deny the defendant's motion in its entirety, The State further respectfully moves this Court to order sanctions and to order the defendant to promptly provide complete disclosure as required by law, including

complete experts' reports, the defendant's statements in their entirety, and all sources upon which any of the defendant's experts have relied in reaching their conclusions in this case.